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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)

Application for Consent to the)
Transfer of Control of Licenses)

MB Docket No. 07-57

XM Satellite Radio Holdings Inc.,)
Transferor)

To)

Sirius Satellite Radio Inc.,)
Transferee)

MAILED
OCT 21 2010
FCC Mail Room

ORDER ON RECONSIDERATION**Adopted: October 18, 2010****Released: October 19, 2010**

By the Commission:

I. INTRODUCTION

1. On July 25, 2008, the Commission approved the applications of Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Holdings Inc. ("XM") to transfer control of the licenses and authorizations held by Sirius and XM and their subsidiaries for the provision of satellite digital audio radio service ("SDARS") in the United States. The grant of these applications authorized the merger of Sirius and XM.¹ The Commission found the transfer in the public interest in light of voluntary commitments made by Sirius and XM, as well as other conditions.²

2. Mt. Wilson FM Broadcasters, Inc. ("Mt. Wilson") filed a Petition for Reconsideration of the Commission's decision.³ Mt. Wilson asserts that the conditions imposed by the Commission and accepted by Sirius and XM are not adequate because the merged entity should have been required to comply with Section 73.3999 of the Commission's rules, which prohibits the broadcast of obscene material and restricts the broadcast of indecent material. Sirius XM Radio Inc. ("Sirius XM") argues in

¹ *Applications for Consent to the Transfer of Control of Licenses from XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee*, MB Docket 07-57, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348 (2008) ("Merger Order"). Sirius XM Radio Inc. became the controlling party of XM on July 28, 2008, when the transaction was consummated. See Letter to Marlene H. Dortch, Secretary, FCC, from Jennifer D. Hinden, Wiley Rein LLP, Counsel, Sirius XM Radio Inc. (Aug. 20, 2008).

² The Commission imposed conditions and the entities made voluntary commitments relating to, among other things, pricing, programming packages, interoperable receivers, and open access for consumer equipment devices. See *Merger Order*, 23 FCC Rcd at 12433-41, App. B (Voluntary Commitments), App. C (Timeline of Commitments).

³ See Mt. Wilson FM Broadcasters, Inc., Petition for Reconsideration, MB Docket No. 07-57, filed Sept. 4, 2008 ("Mt. Wilson Petition"), FCC Public Notice, Report No. 2875 (rel. Sept. 19, 2008).

its Opposition that Mt. Wilson's petition is "procedurally defective" and requests that the Commission deny it.⁴ For the reasons discussed below, we deny Mt. Wilson's petition for reconsideration.

II. BACKGROUND

3. Mt. Wilson filed a petition to deny the Sirius and XM transfer applications.⁵ In a supplement to that petition, Mt. Wilson endorsed a condition proposed by Clear Channel Communications, Inc. that would have required the merging entities to abide by the Commission's broadcast indecency rule, 47 C.F.R. § 73.3999(b).⁶ Mt. Wilson argued that such a condition was warranted because the Commission had become aware that allegedly indecent satellite radio programming was being received over terrestrial radio frequencies on broadcast receivers.

4. The Commission had received complaints that satellite radio programming, including allegedly indecent content, was being heard on some broadcast receivers in automobiles, to the surprise of listeners who did not subscribe to satellite service. The Commission investigated these complaints and determined that satellite programming was received by satellite service subscribers using satellite radio receivers and was then retransmitted on broadcast frequencies by low-power FM modulators so that the subscribers could listen to the programming on their car radios. Because these modulators apparently were operating at power levels well above those authorized for Part 15 devices, their signals were strong enough to be received on radios in nearby automobiles, as well as the radios of the satellite subscribers using FM modulators. As a result, satellite programming appeared to the non-subscribing listeners in nearby cars to be broadcast programming provided by a terrestrial broadcast station. The Commission addressed the issue of these over-powered FM modulators in consent decrees with Sirius and XM that were issued concurrently with the *Merger Order*.⁷

5. On reconsideration, Mt. Wilson argues that the Commission should have imposed a condition requiring the merged entity to abide by the Commission's indecency rule with respect to the "use of unauthorized frequencies to air indecent programming."⁸ Mt. Wilson acknowledges Commission precedent holding that "subscription-based services do not call into play the issue of indecency."⁹ Mt. Wilson recognizes that satellite radio, as a subscription service, may be entitled to the same regulatory treatment.¹⁰ Nonetheless, Mt. Wilson asserts that the airing of allegedly indecent programming by Sirius

⁴ See Sirius XM Radio Inc., Opposition, filed Sept. 17, 2008, MB Docket No. 07-57 ("Sirius XM Opposition"). See also Mt. Wilson FM Broadcasters, Inc., Reply to Sirius XM Radio, Inc. Opposition, filed Sept. 29, 2008 ("Mt. Wilson Reply").

⁵ Mt. Wilson Petition to Deny, MB Docket No. 07-57, filed July 6, 2007 ("Mt. Wilson Petition to Deny").

⁶ Mt. Wilson Supplement to Petition to Deny, MB Docket No. 07-57, filed Mar. 24, 2008 ("Mt. Wilson Supplement"); see also Letter to Marlene H. Dortch, Secretary, FCC, from Lawrence R. Sidman, Paul, Hastings, Janofsky and Walker, LLP, Counsel to Clear Channel Communications, Inc. at Att. 3 (Mar. 12, 2008). Section 73.3999(b) of the Commission's rules states that, "No licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material that is indecent."

⁷ See *Sirius Satellite Radio Inc.*, File Nos. EB-06-SE-250 & EB-06-SE-386, Order, 23 FCC Rcd 12301 (2008) ("*Sirius Consent Decree Order*"); *XM Radio, Inc.*, File Nos. EB-06-SE-148 & EB-06-SE-356, Order, 23 FCC Rcd 12325 (2008) ("*XM Consent Decree Order*").

⁸ Mt. Wilson Petition at 2.

⁹ See, e.g., *Litigation Recovery Trust*, 17 FCC Rcd 21852 (2002) (concerning movies and video programming delivered by satellite to hotels by On Demand Video Corp. and Spectra Vision Inc. pursuant to the Communications Satellite Act).

¹⁰ See also Letter from W. Kenneth Ferree, Chief, Media Bureau, to Saul Levine, Mt. Wilson FM Broadcasters, Inc. (Dec. 15, 2004) (declining to grant a request from Mt. Wilson FM Broadcasters that the Commission commence a (continued...)

XM over licensed terrestrial radio frequencies without the consent of the terrestrial radio licensee, and without the payment of a subscription fee, cannot be characterized as a subscription service.¹¹ Mt. Wilson notes that numerous complaints were filed with the Commission regarding satellite programming that was aired over terrestrial radio stations – and deemed indecent by listeners – due to faulty receiving devices.¹² Mt. Wilson contends that it is immaterial whether the airing of allegedly indecent satellite programming over terrestrial radio frequencies is attributable to the satellite operator's faulty transmitter or excessive power receiving devices, or whether the occurrence is inexplicable.¹³ Mt. Wilson argues that a condition requiring that the airing of indecent programming over terrestrial frequencies be subject to Section 73.3999(b) would serve the public interest and ensure in the future that the new entity, Sirius XM, is more attentive to equipment compliance.¹⁴ Mt. Wilson concludes that consummation of the transaction should not deter the Commission from taking additional action because the companies were aware that reconsideration petitions might be filed, and thus, they assumed any potential risk by consummating their merger.¹⁵

6. Sirius XM opposes the reconsideration petition, asserting that Mt. Wilson fails to establish how the instances where its satellite transmissions were received over broadcast radio frequencies would convert Sirius XM into a "Part 73 broadcaster," thus making it a broadcaster subject to Section 73.3999.¹⁶ Further, Sirius XM posits that expanding the scope of Section 73.3999 to include satellite radio providers would require a rulemaking proceeding.¹⁷ Sirius XM also points to the Commission's enforcement actions taken contemporaneously with the grant of the applications, which were aimed at redressing concerns regarding overpowered FM modulators.¹⁸ Sirius XM argues that the Commission's enforcement action resolved the concerns that appear to underlie Mt. Wilson's petition.¹⁹

7. Mt. Wilson responds that Sirius XM should voluntarily accept a condition that satellite programming received by a terrestrial radio station would be subject to Section 73.3999. Such a condition, according to Mt. Wilson, would assure accountability for violations of the Commission's indecency rule, intentional or otherwise, thus serving the public interest.²⁰ Moreover, Mt. Wilson states that this voluntary condition would not apply to satellite radio programming aired on the assigned satellite

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rulemaking proceeding to amend the satellite digital audio radio service rules to include an indecency provision analogous to that contained in Section 73.3999 of the Commission's rules pertaining to indecent content in broadcast programming).

¹¹ Mt. Wilson Petition at 2. Mt. Wilson adds that, "[P]rogramming originated by the satellite radio operator to a non-subscriber licensed terrestrial radio station and to the listening audience is not a subscription service and is not entitled to the protection" that may be afforded by relevant Commission precedent. *Id.*

¹² Mt. Wilson Reply at 2, n.1

¹³ *Id.*; see also Mt. Wilson Petition at 3.

¹⁴ Mt. Wilson Petition at 3.

¹⁵ *Id.*

¹⁶ Sirius XM Opposition at 2.

¹⁷ *Id.* at 2, n.4 (citing 5 U.S.C. § 553 (Administrative Procedure Act) and 47 C.F.R. §§ 1.399 – 1.407 (procedural rules for requests to amend the Commission's rules)).

¹⁸ Sirius XM Opposition at 3.

¹⁹ *Id.*

²⁰ Mt. Wilson Reply at 2.

frequencies. Mt. Wilson proposes that Section 73.3999 would only be applied in the event programming deemed indecent is received on terrestrial radio receivers.²¹

III. DISCUSSION

8. Reconsideration is appropriate where the petitioner shows a material error or omission in the original order.²² For the reasons discussed below, we conclude that our prior resolution of these issues was sound and we deny Mt. Wilson's petition for reconsideration.

9. We find unconvincing Mt. Wilson's apparent contention that a low-power FM modulator intended to relay satellite programming from a subscriber's satellite receiver to the subscriber's car radio using broadcast frequencies should be considered tantamount to a broadcast station and therefore subject to the broadcast indecency rule. These FM modulators, whether operated in compliance with Part 15 requirements or not, are not engaged in broadcasting as defined in the Communications Act; they are not providing "radio communications intended to be received by the public..."²³ Rather, they are intended to provide a short-distance relay of satellite programming for the sole use of the satellite subscriber.

10. As to the underlying issue of protecting non-subscribing consumers from indecent satellite programming and ensuring compliance with Part 15 requirements, the Commission has already addressed this concern. In the *Merger Order*, the Commission stated unequivocally that all FM modulators or transmitters used in satellite radio receivers must comply with the Commission's Part 15 technical requirements and receive an equipment certification prior to marketing.²⁴ In the *Merger Order*, the Commission also stated that issues related to compliance with Commission regulations were being addressed in the concurrently adopted consent decrees.²⁵ In the *Merger Order* and the consent decrees, the Commission noted the investigations into the entities' noncompliant FM modulators and the conclusion that settlement of these issues by consent decrees was in the public interest.²⁶

11. The Commission stated that the consent decrees terminated the agency's investigations into the entities' compliance with regulations governing FM modulators and the terms of their authorizations for their terrestrial repeaters.²⁷ Moreover, as set forth in the consent decrees, Sirius and XM agreed to make substantial voluntary contributions to the U.S. Treasury, implement certain remedial measures with respect to radio receivers with built-in FM modulators in the hands of subscribers, and implement comprehensive plans to ensure the companies' future compliance with the Commission's

²¹ *Id.* Mt. Wilson states that Sirius XM should voluntarily accept the proposed condition as the "quid pro quo" for the Commission grant of its applications. *Id.* at 3.

²² See *Safeview Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 592, 594, ¶ 7 (2010) (citing *Applications of WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966)).

²³ 47 U.S.C. § 153(6).

²⁴ *Merger Order*, 23 FCC Rcd at 12423, ¶ 165 n.528.

²⁵ *Id.* at 12424, ¶ 169.

²⁶ *Id.*; see also *Sirius Consent Decree Order*, 23 FCC Rcd at 12303; *XM Consent Decree Order*, 23 FCC Rcd at 12325.

²⁷ The Commission stated that the consent decrees terminate "investigations by the Commission into whether . . . certain radio receivers intended for use with . . . satellite radio service and marketed by or on behalf of [Sirius and XM] were in compliance with Section 302(b) of the Communications Act of 1934 . . ." *Sirius Consent Decree Order*, 23 FCC Rcd at 12301 ¶ 1; *XM Consent Decree Order*, 23 FCC Rcd at 12325 ¶ 1. Additionally, the Commission dismissed all pending third-party complaints against Sirius and XM regarding these investigations. *Sirius Consent Decree Order*, 23 FCC Rcd at 12302, ¶ 7; *XM Consent Decree Order*, 23 FCC Rcd at 12326, ¶ 7.

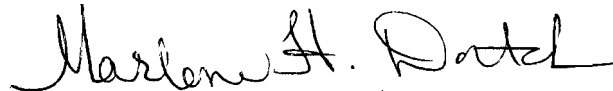
regulations.²⁸ Lastly, the Commission alerted Sirius and XM that it intended to “rigorously monitor” their compliance with the conditions of the consent decrees, their voluntary commitments, and the additional conditions imposed on its grant of the applications to transfer control of their licenses and authorizations.²⁹

12. Mt. Wilson points to no material error or omission in the Commission’s resolution of this issue that warrants reconsideration. We find no reason to anticipate or take additional measures to prevent further potential rule violations at this time in light of the significant safeguards that we have already adopted to ensure future rule compliance by Sirius and XM with our rules. We believe that these actions are sufficient to address the concern raised by Mt. Wilson. Additionally, if any party has evidence of noncompliant behavior by Sirius XM, it may file a complaint with the Enforcement Bureau.

IV. ORDERING CLAUSE

13. Accordingly, for the reasons set forth above, IT IS ORDERED, that the Petition for Reconsideration filed by Mt. Wilson FM Broadcasters, Inc. is denied.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

²⁸ Under the consent decrees, Sirius and XM agreed that every radio receiver that is marketed respectively by each company in the United States shall be designed to comply with Section 302(b) of the Communications Act and Parts 2 and 15 of the Commission’s rules. *See Sirius Consent Decree Order*, 23 FCC Rcd at 12309, ¶ 13; *XM Consent Decree Order*, 23 FCC Rcd at 12333, ¶ 14. Moreover, the consent decrees set forth specific efforts that each company must take regarding radio receivers that were sold or distributed on or before the effective date (August 5, 2008) of the consent decrees. *Sirius Consent Decree Order*, 23 FCC Rcd at 12308, ¶ 12; *XM Consent Decree Order*, 23 FCC Rcd at 12332, ¶ 13.

²⁹ *Merger Order*, 23 FCC Rcd at 12425-26, 12428, ¶¶ 173, 180.